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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 369.

SUSQUEHANNA POWER COMPANY,
APPELLANT,

vs.

STATE TAX COMMISSION OF MARYLAND.

APPEAL FROM THE COURT OF APPEALS OF MARYLAND.

MOTION OF APPELLEE TO DISMISS OR AFFIRM AND BRIEF IN SUPPORT THEREOF.

WM. P. LANE, JR.,
Attorney General of Maryland,
WM. L. MARBURY, JR.,
Assistant Attorney General of Maryland,
TYDINGS, LEVY & ARCHER,
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APPEAL FROM THE COURT OF APPEALS OF MARYLAND.

MOTION TO DISMISS OR AFFFIRM.

Comes now the appellee in the above entitled cause, by its counsel of record, and moves that the appeal herein be dismissed or that the judgment of the Court of Appeals of Maryland be affirmed for the reason that the decision of the lower Court was based upon non-federal grounds adequate to support the judgment, and that the questions on which the decision in this case depends, are so unsubstantial as not to need further argument.

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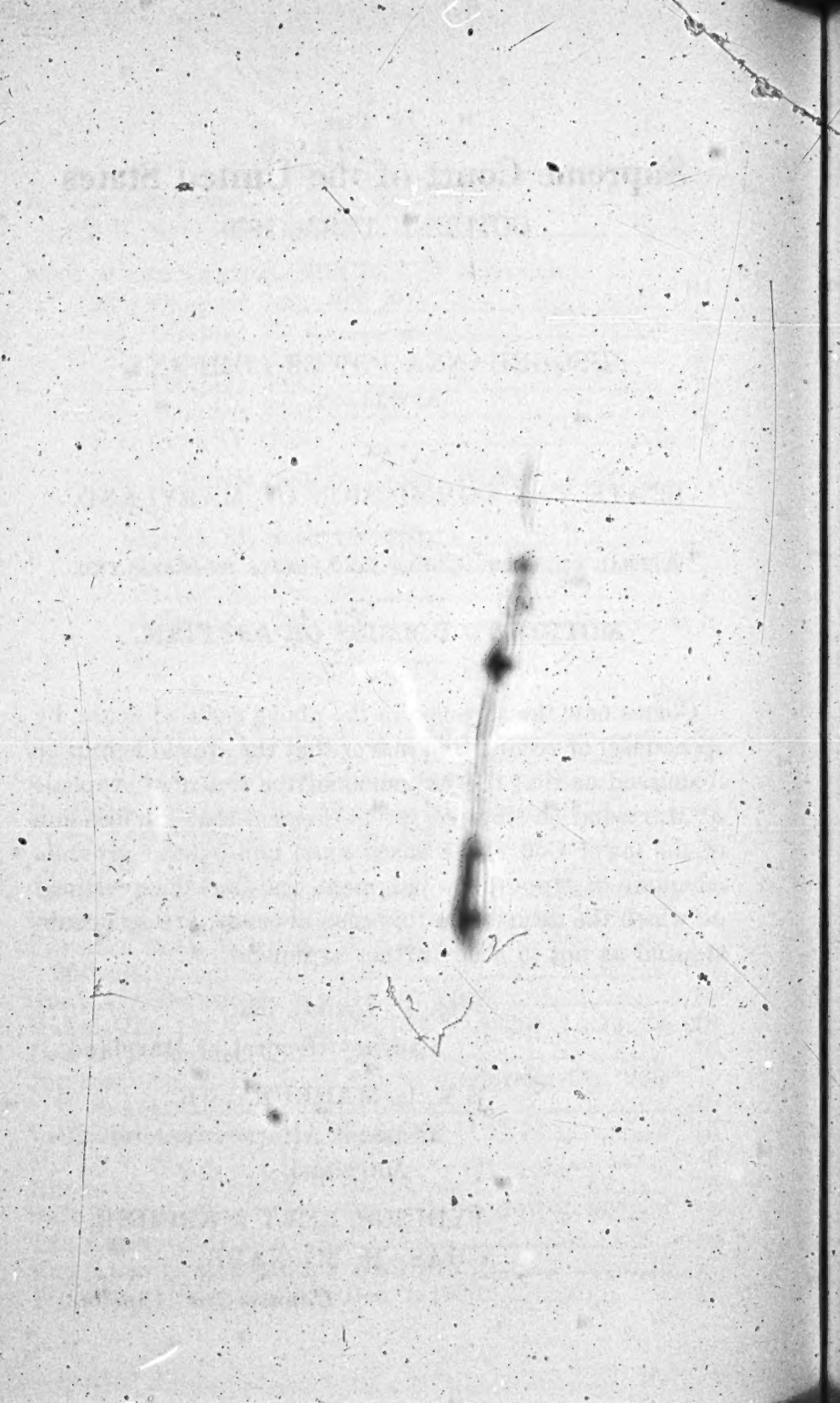

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APPEAL FROM THE COURT OF APPEALS OF MARYLAND.

BRIEF IN SUPPORT OF MOTION TO DISMISS OR AFFIRM.

A.

THE OPINION OF THE COURT BELOW.

The opinion of the Court of Appeals of Maryland was rendered on June 12th, 1930, and has not yet been officially reported. It is printed in the record (r. 64-73) and may be found in 151 Atl. 39.

B.

THE STATUTE AS TO JURISDICTION.

The jurisdiction of this court is sought to be rested upon 28 U. S. C., Sec. 344 (a), which is cited in full in the appellant's "Statement As To Jurisdiction On Appeal."

C.

STATEMENT OF THE CASE.

On October 10th, 1929, the State Tax Commission of Maryland, acting under Sections 154-170 of Article 81 of the Code of Public General Laws of Maryland (Bagby's Edition, 1924), entered a gross tentative assessment against the appellant, a Maryland corporation, of $28,726,132, representing the value of the shares of the appellant's capital stock. After certain deductions required by law, a net assessment remained of $6,000,000 (r., 5, 6). The appellant protested, a hearing was had before the Commission, and the tentative assessment was made final (r. 6). Thereupon an appeal was taken to the Circuit Court of Harford County under Article 81, Sections 253 and 259 of the Code, claiming that the State Tax Commission, acting upon erroneous conclusions of law, had arrived at an assessment greatly in excess of the true assessable value of the shares (r. 3) and praying that the action of the State Tax Commission be set aside. This petition was subsequently supplemented by a petition for a rehearing, filed in the Circuit Court for Harford County, which petition was granted (r. 55-57). On January 20, 1930, that Court entered an order affirming the action of the State Tax Commission (r. 57) from which order an appeal was taken to the Court of Appeals of Maryland (r. 59). That Court affirmed the judgment below accompanying its action by an opinion delivered by Offutt, J., which contains a complete statement of the facts and the law applicable to the present appeal (r. 64-73).

The assignments of error (r. 61-63), which are reiterated by the appellant in its "Statement Of The Points To Be Relied Upon" (r. 73-74), assert that the assess-

ment which the Court of Appeals refused to disturb is repugnant to the Constitution of the United States (a) in that it deprived the appellant of property without due process of law, contrary to the provisions of the 14th Amendment, and (b) in that it imposed a direct tax upon a federal instrumentality.

Due process was claimed to have been denied on the basis (1) that the value of the shares of capital stock was fixed by a method wholly arbitrary and without relation to their real value, pursuant to the "minimum provision" of Section 163 of Article 81 of the Code, that:

> "In no case shall the stock of any corporation, in the aggregate, be valued at less than the full value of the real estate and chattels, real or personal, held by or belonging to such corporation in the several Counties and City of Baltimore, whether the shares of said stock are quoted on the market or not; * * *"

and (2) that the owner of all the shares of capital stock of the appellant is a resident of the State of Pennsylvania where the said shares are taxable, and that the assessment thereof in the State of Maryland is double taxation.

The contention that the action of the State Tax Commission imposes a direct tax upon a federal instrumentality is based on the theory that the value fixed as the basis for the appellant's capital stock includes a value attributable to a federal license granted by the Federal Power Commission.

ARGUMENT.

SUMMARY.

I. The record does not show that the assessment was based upon the "minimum provision" of which the appellant complains; nor that the appellant is a licensee of the Federal Government; nor that the State Tax Commission, in assessing the appellant's stock, included a value attributable to any license issued by the Federal Power Commission.

II. The contention that the "minimum provision" imposes an invalid tax upon the shareholder is wholly unsubstantial.

III. The contention that a State may not tax the shares of capital stock of a domestic corporation, where the shares are owned by non-residents is foreclosed by prior decisions of this court.

IV. The contention that the State, in assessing shares of capital stock for purposes of taxation, may not include value attributable to a federal license, is foreclosed by prior decisions of this court.

I.

The contention that the State Tax Commission assessed the appellant's shares of stock at an arbitrary or fiat value is based upon the following language contained in Section 163 of Article 81 of the Code:

> "and in no case shall the stock of any corporation, in the aggregate, be valued at less than the full value of the real estate and chattels, real or personal, held by or belonging to such corporation in the several

counties and city of Baltimore, whether the shares of said stock are quoted on the market or not; * * *."

It is the contention of the appellant that the value of its shares of stock is wholly unrelated to the value of the real and personal property located in the State of Maryland, and that the section in question is for this reason invalid.

This contention rests upon the assumption of fact that the State Tax Commission, in valuing the appellant's capital stock, invoked this so-called "minimum provision." But the Court of Appeals *expressly found the contrary.* In discussing the action of the State Tax Commission in refusing certain requested rulings (r. 5, 6) based upon the alleged invalidity of this "minimum provision," Judge OFFUTT said (r. 67) (italics ours):

> "The next objection is that the Commission erred in its rulings on the instructions submitted by the appellant. The first answer to that objection so far as it relates to the first, fourth and fifth instructions, is that they are mere legal abstractions which are not shown to have any relation to the action of the Commission or the evidence before it. * * *"
>
> "The fourth and fifth instructions presented the proposition that the mandate in Sec. 163, Article 81, Code, that in no case shall the stock of a corporation in the aggregate be valued at less than the full value of the real estate and chattels held by or belonging to such corporation is unconstitutional. But in view of the express declaration of the Chairman of the Commission that in valuing the stock the Commissioner considered the "net" assets of the corporation, *it cannot be assumed that its action was affected by that mandate, nor does it appear that the assessment was in fact higher than the fair value of the stock assessed.*"

In the same connection must be considered the following passage from the opinion below (r. 66) (italics ours):

> "Taking the second of these questions it cannot be fairly said that the Commission failed to state the reasons which affected its action. For when Mr. Howard, of counsel for the Company suggested at the hearing, 'We would know better how to proceed if the Commission would give us some idea how they arrived at this tentative value of $6,000,000,' the chairman of the Commission replied, 'We made the assessment in accordance with the law. The three elements mentioned by the law-market value of the stock, *net earnings* and net assets, were taken into consideration.'"

And the concluding paragraph of the opinion is also relevant (r. 72):

> "The only remaining question is whether there is anything in the nature of the assessment itself or apparent on the face of the record which can justify the inference that the assessment was not fairly and justly made. In the absence of any showing to the contrary it will be presumed that members of the Commission acted fairly and in good faith, and that the assessment is correct. Cooley on Taxation, Secs. 1073, 1011. And the record contains nothing which can affect that presumption. It is undisputed that the fixed investment of the Company in Maryland is $45,677,316.90. The aggregate assessment made by the Commission was $28,726,132 and from that the amount of the assessment of the real estate $22,726,132 was deducted leaving a balance of $6,000,000, which was allocated to the stock. There is no contention in this case that the aggregate assessment is excessive, or that the valuation of the real estate as such was unreasonable, and we can find nothing in these findings which were based upon information furnished by the Company, or elsewhere in the record, which affects the validity of the assessment which is the subject of this appeal, and the order appealed from will therefore be affirmed."

In other words, the Court of Appeals found that the Commission had properly ascertained the value of the shares to be $28,726,132 *even after making allowance for the company's outstanding indebtedness*, and this conclusion of fact upon which the decision of the Court of Appeals rested finds support in the record. For it there appears that the company has a fixed investment of $45,677,316.60 (r. 11) upon which, by the terms of the lease from the company to the Philadelphia Electric Company *it is guaranteed a net return of 7% plus taxes, expenses and depreciation* (r. 34-35).

It follows that the decision of the Court of Appeals in so far as it relates to the minimum provision, rests upon an adequate non-federal ground, and furnishes no basis for the jurisdiction of this court under 28 U. S. C. 344(a):

McCoy v. Shaw, 277 U. S. 302.

Nor does the record show that the appellant is a licensee of the Federal Government. But doubtless the absence from this record of the license which is printed in full in the record in No. 368, Susquehanna Power Company v. State Tax Commission, is the result of an inadvertance, of which counsel for the appellee do not desire to take advantage.

The claim that the action of the State Tax Commission imposes an unconstitutional burden upon a federal instrumentality rests upon the refusal by the State Tax Commission of a request for a ruling that no value be given to the capital stock in excess of the value of the real estate and chattels, real or personal, for the reason that any

greater valuation of the capital stock would necessarily include the value of the license granted by the Federal Power Company (r. 5). The Court of Appeals held that there was no evidence that the State Tax Commission had included the value of the federal franchise (r. 70), and this conclusion is hard to escape in view of the undisputed testimony in the record that the investment in tangible personalty of the appellant, located in the State of Maryland, amounted to $8,131,341.43 (r. 51). If the minimum provision was invoked, it is apparent that the assessment did not necessarily include any other item of value. If on the other hand, the minimum provision be disregarded, there is evidence as to the net earnings amply sufficient to justify the assessment placed upon this stock without regard to the value of the federal franchise. Plainly net earnings do not necessarily reflect the value of a franchise.

II.

If it be assumed, contrary to the conclusion of the Court of Appeals, that the State Tax Commission in assessing the appellant's shares of stock invoked the minimum provision of Section 163 of Article 81 of the Code, it is nevertheless submitted that there is not the slightest basis for the claim that this provision deprived either the appellant or its shareholders of any constitutional rights. The system adopted by the State of Maryland for the taxation of the property of domestic corporations and of their shareholders, far antedates Chapter 268 of the Acts of 1908, whereby the appellant was incorporated. The minimum provision originated in this manner: Prior to 1841, the real and tangible personal property of corporations was taxed to the corporation at its full value. By Ch. 23 of

the Acts of 1841, the intangible personal property of a corporation was exempted from taxation and a new tax was imposed upon the shares of stock in any bank, institution or company incorporated by this State. The validity of that act was challenged in *The Tax Cases*, 12 G. & J. 117, where it was held that the State could not tax both the property of the bank and the shares of stock in the hands of the shareholders.

See:

Gordon v. Baltimore, 5 Gill 236.
County Commissioners v. Bank, 48 Md. 118.

This decision led to the enactment of Chapter 266 of the Acts of 1847, by Section 5 of which it was provided that the assessed value of the corporate real estate and tangible personalty should be deducted from the aggregate value of the capital stock of the corporation in ascertaining the tax to be paid by the corporation on behalf of the shareholders.

In 1874 it was determined to abandon the system of direct taxation of the real and tangible personal property of corporations and accordingly, by Acts 1874, Ch. 483, Sec. 3, (amended by Acts 1878, Ch. 413, Sec. 3), all corporations having shares subject to taxation were exempted from *any taxation on their real or personal property. In order to prevent the property thus exempted from escaping all taxation*, the same Act included the minimum provision (Acts 1874, Ch. 483, Sec. 87). Subsequently, by Acts 1896, Ch. 120, Sec. 2, the direct tax on corporate real property was restored, together with the requirement that the assessed value of the real property should b-

deducted from the aggregate value of the shares (see Sec. 141 of that Act).

The obvious intent of the Legislature was to restore the direct tax on real property but to preserve an indirect tax in the form of a tax on shares, equal in amount to the full value of the corporation's tangible personal property located in the State, (exempt from taxation to the corporation itself), and to any excess value which the shares might have over and above the value of the real and personal property thus taxed. The tax on the real property is a direct tax on the corporation. The tax on the shares, in so far as the value thereof exceeds the value of the real and tangible personal property located in the State, is a true share tax, payable by the shareholders and measured by the fair value of their shares. The tax on the shares, in so far as the minimum provision is invoked, is a direct tax on the shareholders *as owners without regard to the corporate entity*, based not on the value of their shares but on the value of the corporation's tangible personalty located in the State, *which would otherwise be exempt from taxation.*

That this is the true interpretation of the "minimum" provision, was expressly laid down by the Court of Appeals in the opinion below, from which we quote the following (r. 69): (Italics ours.)

> "There is in this State no direct tax on the personal property of the corporation, Code Art. 1, Sec. 163, and the value of the real estate upon which there is a direct tax, is deducted from the aggregate value of both its real and personal property before its stock is finally valued for assessment. *So that the final assessment of the shares in so far as it repre-*

sents tangible property includes no part of the value of the real estate but is based upon the value of the personal property alone, and that situation is not materially different from what it was in 1874 *when that provision first found its way into the law.* As the law then stood the property of corporations was assessed indirectly through their stock, and the provision meant no more than saying that their holdings of real and personal property, should be assessed to the owners thereof without regard to liens or incumbrances. And while the law has been changed so as to permit the direct taxation of real property held by corporations, the change did not invalidate that provision, because under the amended law the value of the real property was excluded from the valuation of its stock, and that valuation represented only the tangible and intangible personal property of the corporation, without regard to any liens thereon. And since it could have taxed such property directly without reference to such liens there is no valid reason why it may not be taxed indirectly through appellant's capital stock, on an assessment made without reference to liens or debts, for in neither case would the corporation be called upon to pay taxes upon more than the asesssable value of its property. And there is no possible basis for the contention that the method adopted subjects any of the corporate property to double taxation. For under it the realty is subjected only to direct taxation, and the personal property only to indirect taxation, based in both instances on the fair value of the property taxed."

See also *Anne Arundel County v. Sugar Ref. Co.*, 99 Md. 481, from which we quote the following (p. 488):

"Under our system of assessment of property for taxation, all real estate is assessed to the owner in the county in which it lies, and all personal property belonging to natural persons resident in this State is assessed to the owner in the assessment district in which he resides, with the exception of goods and chattels (taxable as such) permanently located in any

other city or county, which are assessed to the owner where they are so located. The personal property of corporations of this State, not having a capital stock whose shares are subject to taxation, is assessed in like manner to such corporations. All existing assessments of property in this State were made either by assessors appointed in each assessment district under the last General Assessment Act, ch. 120 of 1896, or have been added by the County Commissioners since that time under powers conferred by that Act, and by subsequent enactments; the real property of all corporations is taxed by the county assessors, or County Commissioners, but these have no power to value or assess the personal property of corporations having a capital stock whose shares are subject to taxation. The State Tax Commissioner alone is authorized to value and assess such shares, and may examine on oath any officer of such corporation as to the aggregate value of such shares. This aggregate value is the value of all the taxable property of every description owned by said corporation. The taxable value of such shares is ascertained under the law by deducting from their aggregate value, the certified taxable value of the real estate of the corporation and dividing the residuum by the number of the shares, the quotient showing such taxable value. The State Tax Commissioner certifies this taxable value to the County Commissioners of each county, in which any stockholder resides, and the shares of any such stockholders are valued for county and municipal purposes to the owners in the counties in which they respectively reside."

It is true, as was noted by this court in *Corry v. Baltimore*, 196 U. S. 466, and in *Hannis Dist. Co. v. Baltimore*, 216 U. S. 285, that the tax is, *in form*, a tax upon the shares and not upon the capital stock, but in so far as the fair value of the shares is not more than the fair value of the real and tangible personal property located in the State, the tax is, *in effect*, a tax on the property held by

the corporation on behalf of the shareholders, rather than on the shares themselves. In other words, as construed by the Court of Appeals, the minimum provision undertakes *to disregard the corporate entity and to assess to each shareholder a proportionate part of the full value of all tangible personal property belonging to the corporation and having a situs for taxation in the State of Maryland, without regard to any indebtedness.* Manifestly the State might have assessed this tangible personalty direct to the corporation. The State, however, elected to exempt the corporation as such from taxation on this property, and to impose the burden on the shareholders.

The appellant concedes that this tangible personalty might be assessed to the corporation *without regard to any corporate indebtedness* just as a mortgagor may be taxed on the full value of mortgaged real estate. Why then may not the State of Maryland, which alone gave corporate existence to the appellant, *elect to disregard that corporate existence for purposes of taxing tangible personal property located within its boundaries?* Surely the Legislature may to this extent qualify the corporate personality *which it alone has power to create.* As the corporation itself is not taxed, no possible unfairness is involved. The purpose of the provision is to require the corporation's physical property to bear a tax burden *equal to that borne by similar property owned by an individual, against which no allowance is made for indebtedness.* Manifestly the governmental protection and benefits are the same in each case.

A different question might have been presented, if the appellee had been imposing this tax upon the shareholders of corporations incorporated prior to 1874 but when

the Susquehanna Power Co. obtained its charter from the Legislature of Maryland, it was advised of the fact that the system of taxation of which it now complains had been in effect for more than thirty years. A shareholder who purchases stock in that corporation must accept that stock subject to the terms of the charter, which includes the taxing laws of the State.

Corry v. Baltimore, 196 U. S. 466;
Interstate Consol. Street R. Co. v. Massachusetts, 207 U. S. 79, 84.
International & G. N. R. Co. v. Anderson Co., 246 U. S. 424, 433.
Cream of Wheat Co. v. County of Grand Forks, 253 U. S. 325, 328.

III.

The contention that the State of Maryland is not authorized to tax the appellant's capital stock for the reason that the shares are owned entirely by a non-resident seems wholly unsubstantial. If, contrary to the finding of the Court of Appeals, the State Tax Commission invoked the minimum provision, then it is clear that no question of double taxation can arise. The power of the State of Maryland to tax tangible personal property located in that State, though owned by a non-resident, is too well established to require discussion, and it is equally clear that no question of double taxation can arise by reason of the fact that a State imposes a tax on the property of the corporation within its borders and also upon the shares in the hands of the shareholders.

Van Allen v. Assessors, 3 Wall. 573.
Bank of Commerce v. Tennessee, 161 U. S. 134.

If the same State may tax both the corporate property and the shares in the hands of the shareholders without double taxation, how much clearer must it be that no such question can arise when the acts of different sovereignties are involved.

If, on the other hand, the State Tax Commission found it unnecessary to invoke the minimum provision by reason of the fact that the fair value of the appellant's shares exceeded the value of its real and personal property located in the State, then the tax must be regarded as a true share tax on the shareholders in a domestic corporation, and as such well within the power of the State of incorporation.

Corry v. Baltimore, 196 U. S. 466.
Hannis Dist. Co. v. Baltimore, 216 U. S. 285.
Hawley v. Malden, 232 U. S. 19.
Cream of Wheat Co. v. County of Grand Forks, 253 U. S. 325.
Rhode Island Hospital Trust Co. v. Doughton, 270 U. S. 69.

The contention of the appellant that these cases have been overruled by

Safe Deposit and Trust Co. v. Virginia, 280 U. S. 83.
Farmers Loan & Trust Co. v. Minnesota, 280 U. S. 204.
Baldwin v. Missouri, 281 U. S. 586.

is completely refuted by the decision of this court in *Beidler v. South Carolina,* decided November 24th, 1930.

IV.

The contention that the State in assessing the appellants' shares of stock for purposes of taxation may not include value attributable to a federal license is completely disposed of by cases which have been decided by this court at the present term. Of course, insofar as the minimum provision is invoked, the value of a federal franchise must be excluded, but as has heretofore been pointed out, the undisputed testimony shows that the investment of the appellant in tangible personalty located in the State of Maryland, amounts to at least $8,000,000 (r. 51) and as the total assessment on the capital stock was only $6,000,000, there is no basis for the contention that the value of the federal franchise was included.

Assuming, however, that the State Tax Commission disregarded the minimum provision and valued the appellant's shares of stock upon consideration of net assets, net earnings and market value (r. 70), then it was perfectly proper for the State Tax Commission to include the value of the federal franchise and by so doing, no unconstitutional burden was imposed upon a federal instrumentality.

Van Allen v. Assessors, 3 Wall. 573.
Willcuts v. Bunn, decided Dec. 2, 1930.
Educational Films Corp. v. Ward, decided Jan. 12, 1931.

CONCLUSION.

Inasmuch as the present appeal presents no substantial federal question not foreclosed by prior decisions of this Court, it is respectfully submitted that this is an

appropriate case to follow the precedent established in *Hannis Dist. Co. v. Baltimore,* 216 U. S. 285, where a similar appeal was dismissed.

Respectfully submitted,

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